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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JACK MILLER, Defendant and Appellant.	C085351 (Super. Ct. No. 16FE020808)

Defendant Jack Miller was convicted in May 2017 of first degree residential burglary of an occupied building. (Pen. Code, §§ 459, 667.5, subd. (c)(21).)[1] In subsequent proceedings, the trial court found true defendant had two prior serious felony convictions. (§§ 667, subds. (a)-(i), 1170.12.)

On appeal, defendant contends the trial court erred in failing to provide a sua sponte instruction on the lesser included offenses of aggravated trespass and unauthorized entry. (§ 602.5, subds. (a)-(b).) Defendant also argues the trial court erred in admitting

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[1] Undesignated statutory references are to the Penal Code.

evidence that he had two prior residential burglary convictions. In supplemental briefing, defendant further requests we remand the case to permit the trial court to exercise its discretion to strike his serious felony enhancements, pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1-2). We will affirm the judgment and remand the matter for the trial court to exercise its discretion whether to strike the prior serious felony enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

H.G. lived in a home with a backyard that was enclosed by a six-foot-high fence that she kept locked at all times, except on garbage pickup days. She could access the backyard from her kitchen via a sliding glass door. At 7:30 a.m. on October 30, 2016, H.G. was in her kitchen doing laundry when she heard scraping noises coming from outside. She briefly went outside to check if anything was being blown by the wind. It had just started getting light, and H.G. could easily see. She looked for a few seconds but did not see anything suspicious, so she returned inside. She failed to lock the door behind her. The scraping noises started again and H.G. suddenly saw defendant standing inside and closing the sliding glass door behind him. H.G. was scared and demanded he leave. Defendant asked, "Why," and adjusted his feet and stayed where he was. Feeling threatened, H.G. fled to a neighbor's, where she spoke with 911.

Police arrived and established a perimeter around H.G.'s house. Officers found defendant in H.G.'s backyard. Defendant complied with their instructions to get on the ground, and officers handcuffed him and escorted him out through the house. Officers found a remote control in defendant's pocket, which H.G. identified as hers. No burglary tools were found.

At trial, one of the responding officers testified that defendant appeared to be "under the influence of something." He was moving uncontrollably and speaking rapidly to "people who weren't there." Still, when the officers took defendant to jail, it was determined that he was fit for incarceration. Defendant told police that he was being

chased by "Mexicans." He also said he thought the house belonged to his friend, Chris, and he went inside to use the bathroom. In addition, defendant believed his backpack was in H.G.'s car, which was parked in the driveway. Police looked but did not find anything belonging to defendant in H.G.'s car.

H.G. realized defendant had moved several items in her garden, including a shopping cart, flower decorations, a bug zapper, and a decorative cart with a gnome and a bunny. H.G.'s screen door was also damaged, and she found an unfamiliar electric cord in her backyard. Nothing was disturbed in H.G.'s kitchen.

Prior to trial, the prosecution sought to introduce evidence of defendant's five prior burglary convictions, arguing it was relevant to show defendant had the requisite intent when he entered H.G.'s home. Defense counsel objected, arguing the circumstances of defendant's prior crimes were different. The trial court held that evidence of defendant's prior burglaries was admissible as to the issue of intent. During trial, the parties agreed that the jury be informed that defendant was convicted of residential burglary in the first degree in 1990 and again in 2000. (§ 459.) The jury was subsequently instructed pursuant to CALCRIM No. 375, that it could consider the stipulated evidence for the "limited purpose of deciding whether or not the Defendant acted with the intent to commit theft within [H.G.'s] residence, or the Defendant's alleged actions were the result of mistake or accident."

During closing argument, defense counsel argued the prosecution had failed to prove defendant had entered H.G.'s home with the requisite intent, pointing to evidence that defendant was intoxicated that morning and mistakenly believed that he was at his friend's house and wanted to use the bathroom. With respect to defendant's prior convictions, defense counsel encouraged the jury to presume defendant was innocent "no matter what he's done in the past." Counsel also reminded the jury that they knew "nothing" about the circumstances of the prior burglaries, including the identity of the victim, defendant's method of entry, or what, if anything, he took. The prosecutor argued

the prior convictions were "perhaps the most important thing in terms of evaluating his intent" and the veracity of his claim that he made a mistake, since "[p]eople in similar situations act in similar ways." According to the prosecutor, due to defendant's prior convictions, he would have been aware of the elements of burglary when he appeared intoxicated and claimed he thought he was a friend's house and went inside to use the bathroom. Defense counsel countered it was immaterial that defendant might know the elements of burglary.

Defendant did not present an affirmative defense.

In August 2017, the trial court sentenced defendant to 25 years to life and 10 years consecutive for the two prior serious convictions. (§ 667, subds. (a) & (e)(2)(A)(ii).)

DISCUSSION

I

Defendant contends the trial court erred in failing to instruct sua sponte on unauthorized entry of a dwelling house (§ 602.5, subd. (a)) and aggravated trespass (§ 602.5, subd. (b)) as lesser included offenses of burglary (§ 459). Defendant's contentions are without merit.

A trial court must instruct on " 'any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.' " (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117, fn. omitted.) We review de novo a trial court's failure to instruct on an assertedly lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.)

Defendant properly does not argue trespass is a lesser included offense of burglary under the statutory elements test. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344,

italics omitted ["trespass is a lesser related offense, not a lesser included offense, of burglary," and there is no obligation to instruct on such an offense].)

Instead, defendant points to the information, which alleged defendant "unlawfully enter[ed] the inhabited dwelling house . . . and inhabited portion of a building of [H.G.], with the intent to commit larceny and any other felony." Our Supreme Court rejected the same argument made by a defendant facing a virtually identical allegation: the defendant was alleged to have " 'willfully and unlawfully enter[ed] a commercial building . . . with intent to commit larceny and any felony.' " (*People v. Birks, supra,* 19 Cal.4th at p. 118, fn. 8.) The court reasoned the allegation did not "necessarily include criminal trespass," (*ibid*.) and we reach the same conclusion here. In contrast with trespass, "the lack of consent to enter the building at issue is not an element of burglary." (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1304, italics omitted; see also *People v. Pendleton* (1979) 25 Cal.3d 371, 382 [" 'it is settled that the entry need not constitute a trespass' to support a burglary conviction"].) We find no error in the trial court's instructions.

II

Defendant contends the trial court improperly admitted evidence of his prior residential burglary convictions to prove intent. Even though the parties stipulated to the form of the prior conviction evidence, defendant argues there was no evidence the offenses were sufficiently similar to support an inference that he had acted with the same intent during each occasion. Defendant further argues the evidence was highly prejudicial. We find no error.

Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of uncharged offenses to prove propensity or disposition to commit the charged crime. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Hendrix* (2013) 214 Cal.App.4th 216, 238.) "Subdivision (b) of that section, however, provides that such evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan." (*People v. Lindberg* (2008)

45 Cal.4th 1, 22.) "[T]he admissibility of uncharged crimes depends upon three factors: (1) the materiality of the facts sought to be proved; (2) the tendency of the uncharged crimes to prove or disprove the material fact (i.e., probative value); and (3) the existence of any rule or policy requiring the exclusion of relevant evidence (i.e., prejudicial effect or other [Evidence Code] section 352 concern)." (*Hendrix,* at p. 238.) "The decision whether to admit other crimes evidence rests within the discretion of the trial court." (*Lindberg,* at p. 23.)

The primary issue contested at trial was whether defendant entered H.G.'s residence with the intent to commit larceny or another felony. Defendant argued the evidence was insufficient, given his intoxication and his mistaken belief that he was at his friend's house and wanted to use the bathroom. Evidence of defendant's two prior residential burglary convictions was relevant and admissible under Evidence Code section 1101, subdivision (b) for this purpose, especially since the parties stipulated to the form of the evidence presented to the jury. (See *People v. Rocha* (2013) 221 Cal.App.4th 1385, 1393 ["[n]umerous decisions have upheld the admission of prior burglaries on a similar rationale when, as here, a defendant contests the sufficiency of the prosecution evidence to establish the required intent"].)

Neither was the admission of defendant's prior acts unduly prejudicial. "Although a prior criminal act may be relevant for a noncharacter purpose to prove some fact other than the defendant's criminal disposition, the probative value of that evidence may nevertheless be counterbalanced by [an Evidence Code] section 352 concern. Evidence may be excluded under [Evidence Code] section 352 if its probative value is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Hendrix, supra*, 214 Cal.App.4th at p. 238.)

Despite defendant's contentions, the trial court's finding that the probative value of the evidence of the uncharged offenses outweighed any prejudicial effects was within

the bounds of reason. The uncharged and charged burglaries shared the same requisite intent, meaning the evidence of the prior burglary convictions was probative in establishing defendant's intent. The uncharged acts were no stronger or more inflammatory than the charged burglary. (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.) In addition, the stipulation was brief and took up relatively little time at trial. Moreover, the jury was properly instructed that it could only use such evidence for the limited purpose of determining intent and lack of mistake or accident. The jury was further instructed not to conclude from this evidence that defendant has a bad character or is disposed to commit crime. Accordingly, the trial court properly admitted evidence of defendant's prior acts for the purpose of showing his intent.

III

Defendant's sentence includes two five-year prior serious felony enhancements pursuant to section 667, subdivision (a). At the time defendant was sentenced, the court had no discretion to strike such an enhancement. (See former §§ 667, subd. (a), 1385, subd. (b).)

Senate Bill No. 1393, which went into effect on January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes.

Defendant argues that the amendments apply retroactively to his case, which is not yet final. He asks us to remand the matter so the trial court may exercise its new discretion and consider striking the prior serious felony enhancements. The People concede, and we agree.

Unless there is evidence to the contrary, it is reasonable to infer that amendments to statutes that either reduce the punishment for a crime or vest in the trial court the discretion to impose a lesser penalty, such as Senate Bill No. 1393, apply to all defendants whose judgments are not final as of the amendment's effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 742, 745; *People v. Garcia* (2018) 28 Cal.App.5th 961,

972-973.) There is nothing in the amendment suggesting the Legislature intended it to apply prospectively only, so the act applies retroactively to this case.

We agree with defendant that the trial court did not clearly indicate during the sentencing hearing that it would have declined to exercise discretion to lessen defendant's sentence. Accordingly, the appropriate remedy is to remand the matter. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [" ' "[d]efendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court" ' "]; cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand for consideration of new discretion under § 12022.53, subd. (h) inappropriate if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement" even if it had the discretion].)

DISPOSITION

The judgment is affirmed. The matter is remanded for the limited purpose of permitting the trial court to exercise its discretion regarding whether to strike any of the two five-year enhancements pursuant to section 667, subdivision (a). If any of the enhancements are stricken, the trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
BLEASE, Acting P. J.

We concur:

/s/
HULL, J.

/s/
MURRAY, J.